

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/459/ICANN/76

AMERICAN ASSOCIATION OF INDEPENDENT MUSIC (A2IM)

(USA)

vs/

AUBURN HOLLOW, LLC

(USA)

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

gTLD opposed: .BAND
Nature of objection: Community

**American Association of Independent Music (A2IM)
(USA)**

Objector

-v-

**Auburn Hollow, LLC
(USA)**

Applicant

The Parties and their Representation

The Applicant: 10500 NE 8th Street, Suite 350, Bellevue, WA 20166, USA
(auburnhollow@donuts.co; secondary@donuts.co),

represented by John M. Genga and Don C. Moody of The IP & Technology Legal Group, P.C. of 15260 Ventura Blvd., Suite 1810, Sherman Oaks, CA 91403, USA
(john@newgtlddisputes.com; don@newgtlddisputes.com)

The Objector: American Association of Independent Music (A2IM) of 132 Delancey Street, 2nd Floor, New York, New York 10002, USA (rich@a2im.org),

represented by Constantinos Roussos of DotMusic, 950 S. Flower Street #1404, Los Angeles, CA 90015, USA (costa@music.us) and Jason Schaeffer of ESQwire.com P.C., 1908 Route 70 East, Cherry Hill, NJ 08003, USA (jschaeffer@esqwire.com)

The Panel

The Rt. Hon. Professor Sir Robin Jacob of The Faculty of Laws, UCL, Endsleigh Gardens, London, WC1E 0EG, UK (rjacob@ucl.ac.uk), appointed on 12th June 2013 and file transferred to him on 12th August 2013.

EXPERT DETERMINATION

General Procedural Matters and Applicable Rules

1. The Applicant made its Application for the gTLD .band on 13th June 2012 (ID 1-1350-42613). The Objection was lodged on 13th March 2013 and the Response on May 19th 2013.

2. All communications between the parties, and myself have been electronic (Art. 6(a) of the Procedure) and in English (Art. 5(a) of the Procedure). I did not find a hearing necessary. The draft Expert Determination was submitted for scrutiny to the Centre in accordance with Art. 21(a) and (b) of the Procedure.

3. On 12th August 2013 the Objector sought leave to file an additional submission and new information and reply to the Applicant's Response. By an email of 16th August 2013 the Applicant contested the Panel's power to admit the new material and contended that, if there is such a power, the rules for its exercise did not apply here. If nonetheless I decided to admit the new material it sought a right of reply.

4. By my interim ruling of 19th August 2013 I decided I had power to admit the further material (my reasons can be found repeated in my decision in *A2IM v Red Triangle LLC* EXP/460/ICANN/77) and to admit it on the facts of this case. On 6th September 2013 the Applicant duly submitted an additional written statement, a supporting affidavit of Mr Nevett and exhibits.

5. The rules governing the substance of what I have to decide and the procedure to be applied are the Rules for Expertise of the ICC ("ICC Rules"), supplemented by the ICC Practice Note on the Administration of Cases ("ICC Practice Note") under the Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure ("Procedure") of the gTLD Applicant Guidebook ("Guidebook"). I collectively call these "the Rules" but where appropriate will identify the particular rule concerned.

6. Much more specifically the rules as they apply to community objections are set out in a number of Articles of Module 3 of the Guidebook. For convenience I have gathered them altogether as Appendix A to this determination. The broad structure is as follows:

(1) The Objector must show it has standing as defined in Art. 3.2.2 and elaborated in Art. 3.2.2.4, and

(2) The Objector must prove each of the four tests set out and elaborated in Art. 3.5.4.

Both in respect of standing and each of the four tests the burden of proof lies on the Objector (Art. 20 (c) of the Procedure).

7. It is perhaps worth stating explicitly what my task is and more specifically what it is not. It is not to decide whether the Applicant should be awarded the gTLD .band. My task is

more limited: to decide whether the Objector concerned has standing and if so whether it has satisfied the four tests. If all these things are proved then a community objection is successful. If it is not then it will be for other procedures within ICANN to determine what happens next. I am not concerned with these.

Who the parties are and do or propose to do

The Applicant

8. The Applicant's ultimate parent company is called Donuts Inc., a company which has wide ambitions for gTLDs having, through subsidiaries, applied for 307 of them. The Objector calls this a "landgrab." The Applicant says it will create economies of scale and allow more consumer choice. I am neutral about these observations for it is not my function to do more than consider whether or not the Objector has standing and has made out a case on the facts of this case. In all cases Donuts believes it has set in place safeguards which go beyond those required by ICANN in order to maintain access as open as possible.

9. More specifically this is what the Applicant says in its Application about the mission/purpose of its proposed .gTLD .band:

ABOUT DONUTS

Donuts Inc. is the parent applicant for this and multiple other TLDs. The company intends to increase competition and consumer choice at the top level. It will operate these carefully selected TLDs safely and securely in a shared resources business model. To achieve its objectives, Donuts has recruited seasoned executive management with proven track records of excellence in the industry. In addition to this business and operational experience, the Donuts team also has contributed broadly to industry policymaking and regulation, successfully launched TLDs, built industry-leading companies from the ground up, and brought innovation, value and choice to the domain name marketplace.

DONUTS' PLACE WITHIN ICANN'S MISSION

ICANN and the new TLD program share the following purposes:

1. to make sure that the Internet remains as safe, stable and secure as possible, while
2. helping to ensure there is a vibrant competitive marketplace to efficiently bring the benefits of the namespace to registrants and users alike.

ICANN harnesses the power of private enterprise to bring forth these public benefits. While pursuing its interests, Donuts helps ICANN accomplish its objectives by:

1. Significantly widening competition and choice in Internet identities with hundreds of new top-level domain choices;

2. Providing innovative, robust, and easy-to-use new services, names and tools for users, registrants, registrars, and registries while at the same time safeguarding the rights of others;
3. Designing, launching, and securely operating carefully selected TLDs in multiple languages and character sets; and
4. Providing a financially robust corporate umbrella under which its new TLDs will be protected and can thrive.

10. The Application goes on to indicate that Donuts has ample resources, security and experience. It says it “will not tolerate abuse or illegal activity in this TLD, and will have strict registration policies that provide for remediation and takedown as necessary”.

The Objector

11. The Objector is the American Association of Independent Music (“A2IM”). Its Objection Form refers me to its website. What I quote now is taken from that, rather than the Form itself – which mixes argument along with a description of A2IM itself. I make no complaint about that but it is easier to separate out the basic facts about A2IM from its website. The website says under the heading Mission:

The Independent Music Sector has introduced, developed and supported nearly every new musical form which has impacted our society since the beginning of the recording industry. In the present day – perhaps more than ever – the independents are vital to the continued advancement of cultural diversity and innovation in music.

A2IM is a not-for-profit trade organization serving the Independent music community as a unified voice representing a sector that, according to Billboard Magazine, comprises over 34.5% of the music industry’s market share in the United States (and approximately 40% of SoundScan digital album sales). The organization represents the Independents’ interests in the marketplace, in the media, on Capitol Hill, and as part of the global music community.

12. The website indicates the sort of activities undertaken. It says:

During our first 8 years, A2IM has furthered our three part agenda of providing advocacy/representation for independents on issues affecting the music community, finding commerce opportunities for members, and providing member services which include education on issues, networking & presentation events, special offers and general business advice.

13. More specifically the website indicates that A2IM has acted as a spokesperson for its members in relation to negotiations with government about changes or possible changes in

the law and represented independent labels in discussions with major telecom players such as YouTube, Amazon and others.

14. But there is no formal document indicating with precision what the extent of its mandate to speak for members actually is. This is a little surprising for two reasons: firstly the extent of such a mandate is obviously highly relevant to this case and secondly the Rules themselves indicate that one of the factors to be taken into account in considering standing (albeit in the context of *established institution*) is “the presence of a formal charter, or national or international registration”.

15. A2IM has two sorts of member: “Labels” and “Associate Members”. Labels are what in the pre-digital world were called “record companies”. They are still so called though of course much of what they produce is delivered digitally. Typically it is the Label which has the contracts with performers and music and lyric writers. A Label is what in the book world would be called a publisher. The Label members of A2IM are so-called “Indies”, that is to say smaller companies in contrast to major Labels such as Sony or Warner. There are 210 A2IM Label members, nearly all of whom are American which is hardly surprising since it is the American Association of Independent Music. Associate membership is open to companies that “work with, rely upon, or otherwise support independent labels”. There are 131 Associate Members, some of whom are large and well known such as Spotify and iTunes.

16. A2IM’s Objection is being conducted by Mr Constantinos Roussos whose own company DotMusic is itself seeking the gTLD .band as well as .music (this is what I understand from p.2 of the Applicant’s Additional Written Statement). This is not without significance for it makes plain that A2IM does not object to the gTLD .band as a matter of principle, merely to this Application and that in the other .band case I have to decide. After all if .band is in principle possible then the case comes down to competition between the competing applications. As regards the possibility of registration, no one is saying it cannot be done at all. A2IM is clearly being used as vehicle for Mr Roussos to try to eliminate competition for the string .band. That is not fatal to the Objection (see below) for A2IM might nonetheless have a valid community objection of its own. But it causes me to examine the Objection with particular care.

The Fresh Evidence and submissions about it

17. I turn to consider the effect of this first. It consists principally of the 11th April 2013 Beijing Communique of the GAC (“Government Advisory Committee”) to ICANN.

Consumer Protection, Sensitive Strings, and Regulated Markets:

The GAC Advises the ICANN Board:

- Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm. The following safeguards should apply to strings that are related to these sectors:

1. Registry operators will include in its acceptable use policy that registrants comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.

2. Registry operators will require registrars at the time of registration to notify registrants of this requirement.

- 3...

4. Establish a working relationship with the relevant regulatory, or industry self-regulatory, bodies, including developing a strategy to mitigate as much as possible the risks of fraudulent, and other illegal, activities.

- 5...

In the current round the GAC has identified the following non-exhaustive list of strings that the above safeguards should apply to:

- **Intellectual Property**

Here are listed a number of strings. .band is one of them.

18. Although the Objector suggests ICANN has accepted that advice, the actual position (as appear from Mr Nevett’s affidavit of 6th September 2013) is that ICANN is in discussion with the GAC about this and other so-called “sensitive” strings. I do not think it matters, however. For what is clear is that none of the Rules which I have to apply have been changed. They are now as they were when “enacted” in 2012. The advice in no way alters the meaning of any of the Rules.

19. Moreover the advice does not suggest ICANN should change any of the Rules as to a community objection. If ICANN decides the advice should inform it how to proceed generally, then it will act accordingly. The advice is not for a Panel but for ICANN.

20. I accordingly hold that the GAC advice is irrelevant to what I have to decide, namely whether the Objector has standing and if so whether a community objection is successful.

21. The remainder of the material does not relate to new facts. It, along with the responsive Additional Written Statement, helps focus the issues. It is to these I now turn.

Standing

22. The Applicant says the Objector lacks standing for four distinct reasons:

- (a) The Objector is not entitled to claim community status merely because it claims to represent an industry segment;
- (b) The Objector is effectively a co-applicant in that it supports Mr Roussos' company's application for .band. It is contended that co-applicants of their supporters cannot properly object.
- (c) The Objector is not an *established institution* with the Rules;
- (d) The Objector has no *ongoing relationship with a clearly delineated community*.

23. The first two objections are not founded on anything specifically in the Rules.

24. More particularly objection (a) is at least in part covered by provisions in the Rules (e.g. the requirement for a clearly delineated community). It seems to me that to the extent that the Rules cover it, they do. To the extent they do not, the objection simply is not open. I will consider the industry segment point below.

25. As regards objection (b) it is in the nature of an abuse of process objection. In effect it is saying that this is only a string contention issue which falls to be dealt with under Module 4 of the Rules. Again there is nothing in Module 3 which makes the fact that an Objector has a string contention objection of any sort a community ground of objection. On the other hand the fact that the Objector in effect supports a rival application must, as I have said, weaken any community objection which it seeks to raise.

26. Accordingly I reject reasons (a) and (b) as freestanding objections to standing.

27. As to (c), *established institution*, the Applicant submits

An “established institution” should have: (a) a level of global recognition; (b) existence for some length of time; and (c) historical evidence of existence, such as a formal “charter” showing formation not merely “in conjunction with” the new gTLD process. Here, Objector fails to provide any information regarding its existence, save an empty assertion about “its first 7 years.” Objn at 7. It claims to “serve the Independent music community” and to represent “a broad coalition of music labels compris[ing] over 32.6% of U.S. music industry’s market share (38% of digital sales).” *Id.* at 4. In support, Objector offers no claim or evidence of its jurisdictional formation and/or reach or identification of its members and their tenure. Objector only offers unsworn, self-serving hearsay as to its formation and composition *See* Objn at 4-5. It volunteers no organizational documentation whatsoever, suggesting that Objector came together no earlier than seven years ago at the time that ICANN began the policy development for new gTLDs. *Id.* at 7.

Further, Objector’s extremely narrow representation of a handful of *independent* music industry interests *in the United States* belies any “global” recognition among the numerous music interests throughout the world that have nothing to do with Objector’s specific constituency. The dearth of evidence from Objector makes it impossible for the Panel to find a “global” institution “established” and functioning for purposes independent of this Objection.

28. I reject this submission. The Objector’s website conveys to me an organisation which has had an independent existence for some eight years now. Although its members do not even comprise the majority of US Indie Labels, that is no reason for saying it is not established. It is true that the Objector is an essentially American only organisation, but the US being as commercially significant as it is, the Objector is bound to have some global outreach. It was clearly not established for any purpose connected with gTLDs. It is also true that there is no formal charter or validation by a government or the like, but the fact that the US Government is open to representations from A2IM seems to me a clear indication that it is regarded as established.

29. But (d) is much more problematic. This part of the standing requirement is linked with the first test which must be proved by one who has standing. For in my view these two subjects are interrelated. To have standing a party must be an “established institution associated with a clearly delineated community”. And the first test which must be passed for one who has standing is whether “The community invoked by the objector is a clearly delineated community.”

30. The .band string is explicitly or implicitly targeted at groups of musicians who collectively perform music and who are described as “bands.” Not all such groups of

musicians are so-described (e.g. orchestras or choirs are not called band) but many are – from bands of popular musicians to the town band or the brass bands of the North of England. Of course commercially speaking it is pop music bands which matter most – both from the point of view of making recordings and live performance but the targeting must include all sorts of band.

31. Can all the various disparate types of groups of performers around the world who might fall with the description “band” be described as “a community”? I think not. Just because a group of musicians may be called a “band” does not mean it forms part of anything which can fairly be called a “community” of bands.

32. A2IM’s members are not themselves bands at all. Its members doubtless have an interest in the bands signed to them, but that interest is only indirect. A2IM does not represent or even purport to represent bands of any sort. Although it exhibits letters of support from some of its members, there are none at all from any actual band or its manager so far as I can see – indeed bands themselves cannot be members of A2IM. It is not shown (e.g. by reference to a constitution) that A2IM even has authority to speak for its members in relation to this dispute.

33. As to A2IM’s associate members, whilst they very probably support some of the work which A2IM does, I cannot see merely by becoming an associate member a party thereby confers on A2IM to speak for it in relation to any specific matter. It is unthinkable, for instance, that A2IM have authority to speak for Apple (iTunes) or Spotify. Still less can one take it that A2IM speaks for any band which may be associated with any particular associate member.

34. Moreover there is simply no evidence of any relationship, ongoing or otherwise, between A2IM and anything which might be described (if it were possible – which I do not think it is) as a community of bands.

35. In these circumstances I conclude that it is not proved that there is such a thing as a community of bands or that A2IM is “associated” with any bands at all, still less with a “clearly delineated community” of bands.

36. I therefore hold that A2IM lacks standing to make this Objection. The Applicant therefore prevails.

Other Points

37. That being so it is not strictly necessary for me to go further. I will, however, consider the question of “detriment” (rule 3.5.4 of the Guidelines).

38. More specifically I cannot see that the grant of the Application would cause any, still less material, detriment to a band community, supposing such a thing existed. No actual band of any sort supports the Objection. And the Objection itself is not to .band in principle (rather, A2IM is supporting Mr Roussos’s application for .band). The Objection alleges that the string will be abused by “bad actors” but fails to spell out how, given that the Applicant will not only comply with ICANN guidelines but has offered additional safeguards.

39. At the very least, since it supports Mr Roussos’ application for .band, the Objector should have demonstrated how that Application would not cause detriment but this one would. I just do not see that. So I hold, and this is another distinct reason for dismissing the Objection, that the detriment requirement is not made out.

Costs

40. Pursuant to Art. 14(e) of the Procedure, upon termination of the proceedings the Dispute Resolution Provider shall refund to the prevailing party , as determined by the panel, its advance payment in costs, The Applicant has prevailed, and thus shall have its advance costs refunded by the Centre.

Decision and Disposition

41. In accordance with Art. 21(d) of the Procedure, the Expert therefore renders the following Expert Determination:

1. The Objection of American Association of Independent Music is dismissed and the Applicant Auburn Hollow, LLC prevails.

2. The Applicant, Auburn Hollow, LLC, is entitled to a refund of its advance payment of costs by the Centre pursuant to Art. 14(e) of the Procedure.

Date: ...18th Feb 2014

Robin Jacob

The Rt. Hon. Professor Sir Robin Jacob

Expert

Annex A

The Applicable Rules for Community Objections

gTLD Applicant Guidebook, Module 3

3.2.1 Grounds of Objection

A formal objection may be filed on any one of the following four grounds:

...

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3.2.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by a panel of experts designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

...

For a Community ground objection only

An “established institution associated with a clearly delineated community” may object

3.2.2.4 Community Objection

Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution –

Factors that may be considered in making this determination include, but are not limited to:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-

governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a clearly delineated community –

Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted.

For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a clearly delineated community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and
- The application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted.

Each of these tests is described in further detail below.

Community

The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to:

- The level of public recognition of the group as a community at a local and/or global level;
- The level of formal boundaries around the community and what persons or entities are considered to form the community;
- The length of time the community has been in existence;
- The global distribution of the community (this may not apply if the community is territorial); and
- The number of people or entities that make up the community.

If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail.

Substantial Opposition

The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to:

- Number of expressions of opposition relative to the composition of the community;
- The representative nature of entities expressing opposition;
- Level of recognized stature or weight among sources of opposition;
- Distribution or diversity among sources of expressions of opposition, including:
 - Regional
 - Subsectors of community
 - Leadership of community
 - Membership of community
- Historical defense of the community in other contexts; and
- Costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail.

Detriment

The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted. An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment.

Factors that could be used by a panel in making this determination include but are not limited to:

- Nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string;
- Dependence of the community represented by the objector on the DNS for its core activities;
- Nature and extent of concrete or economic damage to the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; and
- Level of certainty that alleged detrimental outcomes would occur.

If opposition by a community is determined, but there is no likelihood of material detriment to the targeted community resulting from the applicant's operation of the applied-for gTLD, the objection will fail.

The objector must meet all four tests in the standard for the objection to prevail.